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No. 93-1340

In The

Supreme Court of the United States

October Term, 1993

UNITED STATES OF AMERICA,

Petitioner,

v.

GARY MEZZANATTO,

Respondent.

Petition for A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I

Whether the Justice Department's waiver rule violates the public policy behind Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6).

II

Whether the Justice Department's waiver rule violates separation of powers principles.

III

Whether the Justice Department's waiver rule lends itself to prosecutorial vouching.

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INTRODUCTION

In one form or another, the guilty plea has been with the common law for some 500 years. See, *North Carolina v. Alford*, 400 U.S. 25, 35-36, n. 8 (1970); 13 Law & Society Review 211, 214 (1979). Plea-bargaining, as we know it today, probably began in this country in the nineteenth century. 13 Law & Society, *supra*, at pp. 224-227. By the 1920's, plea-bargaining had grown into an institution of the American criminal justice system. *Id.* at pp. 227-229, 235; 79 Colombia Law Rev. 1, 29 (1979). The growth of urban culture and the associated rise in crime required an expedient to manage the ever-growing number of criminal cases. See, 13 Law & Society, *supra*, at pp. 235-240. As explained by the Supreme Court in *Blackledge v. Allison*, 431 U.S. 63, 71 (1976), "Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of the country's criminal justice system. Properly administered, they can benefit all concerned."

Recognizing the importance of the overall plea process, Congress enacted Rule 11 of the Rules of Criminal Procedure, a monolith of the federal system. In 1974 and 1975 came the plea-statement rules, Rule 11(e)(6) of the Rules of Criminal Procedure and Rule 410 of the Rules of Evidence, (hereafter "The Rules" or "the plea-statement rules"). The Rules, in their present form, are the product of extended legislative activity – lengthy debates, countless drafts and revisions, and several amendments. By their terms, The Rules bar the admission of plea-statements at trial for any purpose. The drafters knew from history and experience that, if plea-bargaining were to play a meaningful part in the federal criminal justice

system, plea-discussions had to take place in a risk-free environment. Indeed, the broad exclusionary language of The Rules reflects this very wisdom.

The Justice Department thinks otherwise, putting into practice its waiver rule to undermine much of what The Rules were meant to accomplish. For several reasons, the government's waiver practice has no place in this statutory scheme. At a minimum, it subverts public policy and violates separation of powers principles. As such, this waiver rule should be held invalid, now and forever.

REASONS FOR DENYING THE WRIT

I

THE GOVERNMENT'S WAIVER RULE VIOLATES PUBLIC POLICY.

Federal Rule of Evidence 410 and Criminal Rule of Procedure 11(e)(6), create a blanket prohibition against the admission of plea-statements. Slip opn., pp. 7045-7046. Refusing to permit waivers[1] of The Rules' protections, the Court of Appeals held: "[T]o allow waiver of Rule 410 and 11(e)(6), which are part of the plea bargaining mechanism, could damage the system approved by Congress and the Supreme Court. They do

[1] By waivers, the Court of Appeals meant affirmative waivers – those waivers appearing on the face of the record – as opposed to procedural defaults. See, *United States v. Olano et al.*, ___ U.S. ___; 113 S.Ct. 1770, 1777 (1993) ("Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.' (Citations.)").

not guarantee substantive rights so much as they guarantee fair procedure."[2] App. 9a.

Four years before the enactment of The Rules, the Supreme Court in *Santobello v. New York*, 404 U.S. 257, 260-261 (1971) underscored the importance of plea-agreements, and the importance of fair procedures in securing them:

> "The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice. *Properly administered*, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.

[2] The Dissent argued that the Majority's reference to The Rules as a procedure in one context, and as a right, in another, betrays a fundamental flaw in the Majority's analysis. Appendix, 12a-13a. But the Dissent's emphasis on labels overlooks a more basic aspect of this inquiry. In evaluating this issue, the Court should focus on the effect, rather than the semantics, of the government's waiver policy. The Majority recognized as much and explained, "To allow waiver of these rules would be contrary to all that Congress intended to achieve. . . . "). Appendix, 7a. Cf. *INS v. Chadha*, 462 U.S. 919, 965, n. 7 (1983) (conc. opn., Powell, J.) ("reasonable minds may disagree over the character of an act, and the more helpful inquiry, in my view, is whether the act in question raises the dangers the Framers sought to avoid."); Cf. *American Dredging Co. v. Miller*, ___ U.S. ___; 62 U.S.L.W. 4130, 4138 (1993) (dis. opn. J. Kennedy) ("Procedural or substantive, the forum non convenience defense promotes comity and trade. The States are not free to undermine these goals.")

> "Disposition of charges after *plea discussions* is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and by, shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned. [Citation.]
>
> "However, all of these considerations *presuppose fairness in securing agreement* between an accused and a prosecutor. . . . "

Italics added.[3]

Basic procedures governing plea-bargaining have been with the law for some time. See, *Hallinger v. Davis*, 146 U.S. 314, 324 (1892). The promulgation of Rule 11 of the Rules of Criminal Procedure, however, marked the beginning of what was to become a complete and detailed set of procedures controlling nearly all aspects of the plea process. Its purpose from the beginning has remained constant throughout its evolution – "The fairness and adequacy of the procedures on acceptance of pleas of guilty are of vital importance in according equal justice to all in the federal courts." See, Adv. Committee

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[3] See also, *United States v. Goodwin*, 457 U.S. 368, 378-379, n. 10 (1981) (importance of institution of plea-negotiation process); *Bordenkircher, Penit. Superintendent v. Hayes*, 434 U.S. 357, 364 (1977) (plea-negotiations must be encouraged).

Notes (1966 Amendments), reprinted in 18 U.S.C.A. Rule 11, p. 346. As an integral part of this enactment, the plea-statement rules share this common goal of "fundamental fairness." See, Advisory Committee Notes (1974 Amendments), reprinted in 18 U.S.C.A. Rule 11, p. 351.

For the most part, the common law and statutory views of plea-bargaining have developed along the same line. Both have seen the tremendous benefits plea-bargaining has brought to the criminal justice system. Yet, in some respects, Congress' conception of plea-bargaining is more expansive than the one generally voiced by the Supreme Court. In discussing the benefits of plea-bargaining, the Court has usually spoken of its value in terms of saving time, expense and resources, or in terms of its rehabilitative effect. See, *Brady v. United States*, 397 U.S. 742, 753 (1969).

The Judicial Committee ("The Committee") of Rule 11 recognized this much, but believed plea-bargaining could go further. Specifically, plea-bargaining was seen as a tool to investigate and prosecute criminals. "For example," the Committee noted, "the plea agreement may bind the defendant to cooperate with the prosecution in a different investigation. The Committee intends by its approval of Rule 11(e) to permit the parties to agree on such terms in a plea agreement." See, Notes of Judiciary Committee (1975 Amendment), reprinted in 18 U.S.C.A. Rule 11, p. 353. The Committee also observed: "Finally, a plea agreement may also contribute to the successful prosecution of other more serious offenders. . . . " See, *Id.*

at p. 350.[4] Thus, law enforcement concerns, among others, figured into the overall statutory calculus.[5]

More often than not, plea-bargaining starts with discussions between the defendant, (his attorney), and the prosecutor. See, Louisell & Mueller, 2 Fed. Evid., "Rule 410," § 187 p. 539 (1989 ed.). As such, The Rules function as the catalyst of the whole plea-bargain system, setting into motion the events culminating in a judicially-approved plea-agreement. See, Charles A. Wright & Kenneth W. Graham, Jr. 23 Federal Practice and Procedure, § 5341, p. 353. This is their role and their end. And, to this end, The Rules were designed to encourage plea-discussions by creating a free and open atmosphere. See, Louisell & Mueller, 2 Fed. Evid., *supra*, § 187, p. 535 ("The intent of both [Rules] is to facilitate plea bargaining, by making it possible for defendants to engage in dialogue with prosecutors without fear that what they say may be used against them if the effort to negotiate a plea ultimately fails.").[6]

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[4] Thus, the Majority's analysis of The Rules is not only persuasive, but also representative of Congress' thinking at the time of their enactment and subsequent amendments. See, Appendix 6a-7a.

[5] The Dissent's belief that a reduction in the number of plea agreements will not necessarily harm the criminal justice system appears untenable in light of what has been said by the Court and Congress. Appendix 16a; See, *Brady v. United States*, *supra*, 397 U.S. at p. 752, n. 10 (estimate that 90-95% of all criminal cases end in guilty pleas).

[6] So important is this underlying policy that the protections of the plea-statement rules extend to sentencing proceedings. See, U.S.S.G. § 1B1.8, App. n. 3

With this aim in mind, the Advisory Committee conceived The Rules to have the broad effect of excluding all plea-statements for any purpose. See, Wright, 23 Fed. Prac., *supra*, § 5341, pp. 333-334. This baseline proposition did not sit well with the Justice Department. Justice, the government believed, would not be served unless plea-statements could be admitted for impeachment. This point was hotly contested, not only during the drafting and adoption of The Rules, but also during their subsequent amendments. Yet, throughout this ongoing debate, this application of The Rules never changed. See, *Id.* at pp. 339-348.

These pressures, however, were to affect The Rules in the other ways. Specifically, Congress amended The Rules to provide for admission of a plea-statement in a perjury prosecution, where the plea-statement was made under oath and in the presence of counsel. *Id.*, at pp. 344-345. This narrow exception posed a potentially serious impediment to open and candid plea discussion, and the Advisory Committee knew it. Yet, on the whole, the Committee believed that this limited amendment was necessary to ensure the integrity of the judicial process:

> "The Committee recognizes that even this limited exception may discourage defendants from being completely candid and open during plea negotiations and may even result in discouraging the reaching of plea agreements. However, the Committee believes that, on balance, it is more important to protect the integrity of the

> judicial process from willful deceit and untruthfulness. . . . "[7]

See, Notes of Judiciary Committee, reprinted in 18 U.S.C.A. Rule 11, at pp. 353-354; See also, 2 Fed. Evid., Louisell & Mueller, *supra*, § 184, p. 517 (exception seen as a compromise of Justice Department's efforts).

This discussion so far gives but a brief sketch of the complicated and extended development of the plea-bargain process. In view of the legislative history of Rule 11 in general and of the plea-statement rules in particular, and in light of their overriding purpose and their comprehensive and detailed language, we must accept the basic proposition that Congress intended to establish absolute procedures for the plea-process. Cf. *United States v. Mississippi Valley Co.*, 364 U.S. 520, 550-551 (1960); See, *McCarthy v. United States*, 394 U.S. 459, 471-472 (1968).

In this case, and in others as well,[8] the government has found a defendant willing to waive the procedures and protections of The Rules. For the government, the willingness of a defendant alone is enough. But the Supreme Court has not been so quick to sanction waivers of legislation, legislation having such broad public importance. For example, in *Tony and Susan Alamo Foundation et*

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[7] Apparently, at the time of the preparation of this note, the Committee had not considered the other exception to The Rules, admission of a plea-statement to clarify a previously received plea-statement.

[8] See, *United States v. Dortch*, 5 F.3d 1056, 1067-1069 (7th Cir. 1993); *United States v. Stevens*, 935 F.2d 1380, 1396 (3rd Cir. 1991); *United States v. Goodapple*, 958 F.2d 1402, 1408-1409 (7th Cir. 1992).

al. v. Secretary of Labor, 471 U.S. 290 (1984), the Court held that employees of a business could not, as a matter of law and policy, waive the minimum protections of the Fair Labor Relations Act by agreeing to work without pay:

> "That the associates [employees] themselves vehemently protest coverage under the Act makes this case unusual, but the purposes of the Act require that it be applied even to those who would decline its protections. If an exception to the Act were carved out for employees willing to testify that they performed worked 'voluntarily,' employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act. [Citations.] Such exceptions to coverage would affect many more people than those workers directly at issue in this case and would be likely to exert a general downward pressure on wages in competing businesses. . . . "

Id. at p. 302; see also, *Brooklyn Bank v. O'Neil*, 324 U.S. 697, 704 (1944) (no waiver of statute having strong public interest); *Barrentine, et al. v. Arkansas-Best Freight System Inc.*, 450 U.S. 728, 740 (1980) (no waiver of statute when it would thwart legislative policy); *United States v. Acme Process Equipment Co.*, 385 U.S. 138 (1966) (agreement of parties unenforceable if it substantially impairs public policy interest protected by legislation); *Phillips v. Grand Trunk Ry.*, 236 U.S. 662, 667 (1914) (carrier may not change fixed and uniform statutory period of limitation by express waiver).

More recently, the circuit courts have decided that the provisions of the Speedy Trial Act are not waivable. The substantial public interest behind the Act prohibits waivers of its time-provisions, even though defendants have agreed to waive them:

> "In *Kington* [875 F.2d 1091 (5th Cir. 1989)], we joined all the other circuits which have addressed the question in recognizing that the provisions of the Speedy Trial Act are not waivable by the defendant. (Citations.) The Act is intended both to protect the defendant from undue delay in his trial and to benefit the public by ensuring that criminal trials are quickly resolved. Allowing the defendant to waive the Act's provisions would compromise the public interest in speedy justice. In the vast majority of cases, the defendant will be quite happy to delay the final determination of his guilt or innocence. The Act's central intent to protect society's interests requires that a defendant's purported waiver of his rights under the Act be ineffective to stop the speedy trial clock from running. . . . "

United States v. Willis, 958 F.2d 60, 63 (5th Cir. 1992).

In the same sense, The Rules are not so much statutes designed to protect the procedural rights of defendants as they are instruments of public policy embedded to preserve the institution of plea-bargaining.

To support the present waiver theory, the government and the Court of Appeals' dissenting opinion rely heavily upon *Town of Newton v. Rumery*, 480 U.S. 386 (1986). See, Pet. Cert., pp. 7-8. But *Newton* bears only a superficial resemblance to the present case. There, the

Court held that a defendant, under a release-dismissal agreement, may waive his right to prosecute a civil rights suit against the government in much the same way as a defendant may waive his various constitutional rights pursuant to a plea-bargain agreement. But while a release agreement may serve as a suitable analogy to a plea-*agreement*, *id.* at p. 393, n. 3, its logic does not extend to a plea-*discussion*. The government's failure to appreciate this distinction undercuts its entire analysis.

A plea-discussion, the beginning of the plea-bargain process, is several steps removed from the approved plea-agreement itself. To secure and consummate a plea-bargain agreement, Congress set in place various detailed procedures outlined in Rule 11. For example, a trial court must advise the defendant of the nature and consequences of a guilty plea, and the trial court must be satisfied with the factual basis for the plea. Fed.R.Crim.P. 11(c), 11(f). These and other features of Rule 11 make up the battery of procedures safeguarding the defendant throughout the course of the plea process.

To prevail under the rationale of *Newton*, *supra*, 480 U.S. 386, then, the government would have to convince this Court that the whole plea-bargain system, from beginning to end, is subject to the waiver rule. Given this well-integrated and unitary statutory scheme, this Court could not permit waivers of some of the Rule 11 provisions, but not of others. Cf. *United States v. Montalvo-Murillo*, 495 U.S. 711, 719 (1990) (may not treat provisions of an integrated Act differently). And, to allow waivers of all provisions of the plea-bargain mechanism would create profound problems. Taken to its logical conclusion, the government's waiver practice would require the trial

court to abandon many of its Rule 11 obligations. Surely, this result was never contemplated by Congress. See, Notes of Conference Committee (1983 Amendment), reprinted in 18 U.S.C.A. Rule 11, p. 363. ("it would not be harmless error if the trial judge totally abdicated to the prosecutor the responsibility for giving to the defendant the various Rule 11 warnings, as this 'results in the creation of an atmosphere of subtle coercion that clearly contravenes the policy behind Rule 11.' (Citation").).

II

THE GOVERNMENT'S WAIVER RULE VIOLATES SEPARATION OF POWERS PRINCIPLES.

"The Framers of our Government knew that the most precious of liberties could remain secure only if they created a structure of Government based on a permanent separation of powers. (Citation.)" *Public Citizen v. United States Department of Justice*, 491 U.S. 440, 468 (conc. opn., J. Kennedy) (1988). For this reason, the Constitution assigns a specific role to each of the three divisions of government. Article II of the Constitution obligates the Executive branch to "take Care that the Laws be faithfully executed." This constitutional charge begins with the President and flows to all the subordinate agencies and employees of the Executive branch. *United States v. Redondo-Lemos*, 955 F.2d 1296, 1299 (9th Cir. 1992). As we shall see, through its waiver rule, the Justice Department (an agency of the Executive branch) has seriously undermined these separations of power principles.

In analyzing the legislative history of the plea-statement rules, the commentators have highlighted the Justice Department's peculiar involvement in their making. See, 23 Wright, Fed. Prac., *supra*, § 5341, pp. 334-348; 2 Louisell & Mueller, Fed. Evid., *supra*, § 184, pp. 509-518. From the outset, the Justice Department opposed a broad application of The Rules, viz., the exclusion of plea-statements for impeachment. At different times and in various ways during the legislative process, the Department of Justice sought to limit the scope of The Rules, but without success. *Ibid*. Now, through its insidious waiver policy – an apparently "widespread practice"[9] – the Justice Department renews its frustrated battle against the broad application of The Rules, this time without opposition from Congress. Cf. Wright, *supra*, § 5341, p. 347 ("a cynic might see in these proposals yet another chapter in the continuing saga of the Justice Department's efforts to restrict the scope of Rule 410 as narrowly as possible"). Pure and simple, by its present waiver rule, the government now attempts to do indirectly what it could never accomplish directly. Cf. *United States v. Stemm*, 847 F.2d 636, 638, n. 1 (10th Cir. 1988) ("The court cannot condone the Government accomplishing through indirect means what it promises not to do directly . . . ").

Perhaps, in one sense, this case presents a question of style and semantics; the Justice Department has framed its approach to plea-negotiating in familiar waiver

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[9] See, Pet. Cert., p. 10.

language.[10] [RT 366]. But should the constitutionality of the waiver policy be decided by its form or by its effect? Should the result be any different if, say, the waiver rule were expressed in more authoritative terms? See, *Youngstown Co. v. Sawyer*, 343 U.S. 579, 589-592 (1951) (written executive order). If we are to accept the wisdom of the Court's teachings, then any intrusion of one branch of government into the business of another, no matter how slight or subtle, should not be tolerated. See, *Public Citizen v. Dept. of Justice, supra*, 491 U.S. at p. 485 (conc. opn., J. Kennedy).

In spite of all that Congress considered and decided, the government relentlessly argues that certain law enforcement interests should outweigh any damage its waiver policy may cause the plea-bargain system or the defendant. Pet. Cert., pp. 11-14. In sum, the government forebodes the worst if this "weapon" were removed from the "prosecutor's arsenal." *Id.* at p. 13. But whatever merit these policies have in the abstract, they were never adopted by Congress. Cf. *United States v. Mississippi Valley Co.* 364 U.S. 520, 565 (1960) (result controlled by public policy of statute, not by balancing the equities); *Federal Deposit Ins. Corp. v. Meyer*, ___ U.S. ___; 62 U.S.L.W. 4138, 4143 (1993) ("Meyer's argument implicitly suggests that the funds used for indemnification could be shifted to cover the direct liability of federal agencies. That may or may not be true, but decisions involving "federal fiscal policy" are not ours to make . . . We leave it to Congress

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[10] In other contexts, waivers have been viewed as violating separation of power principles. See Generally, *United States v. Melancon*, 972 F.2d 566, 574 (5th Cir. 1992) (dis. opn., J. Parker).

to weigh the implications of such a significant expansion of Government liability."). In fact, many of these policy considerations, continuously pressed by the Justice Department, were ultimately rejected by Congress. Appendix 4a. The legislative process having ended, the government would have us now apply a balancing test to determine the propriety of its efforts to "improve" The Rules. See, *Public Citizen v. Dept. of Justice, supra*, 491 U.S. at p. 486 (balancing test not applied when the power to make the decision has been committed to a particular branch of government). *Youngstown, supra*, 343 U.S. at p. 588 ("The Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control.").

And, even if we were to meet the government's policy argument on its own terms – as a question to be rightfully decided by this Court – the government's position still remains unsound. The Justice Department argues that its waiver rule is an "effective means of policing the truthfulness of the information proffered by the defendant . . . " Pet. Cert., p. 11, n. 1. But the purported benefits of the waiver rule are more than offset by its detriments. For example, a defendant implicated in a criminal offense may well tailor his "proffer" statements to his anticipated defense, rather than fully reveal all the facts known to him. In so doing, the defendant avoids leaving a trail of impeachment evidence. Undoubtedly, this result runs counter to The Rules' objective.

What is more, the government's waiver rule invites prosecutorial abuse. Specifically, a prosecutor may use the plea-discussion setting as a pretext for what is in fact

an interrogation to gut the defendant's case. To illustrate, an Assisting United States Attorney, engaging in a plea-discussion, may have no interest in seeking information about other defendants or suspects, but instead may be solely concerned with the defendant's involvement in the offense. And, the prosecutor may have no intention of giving consideration for the defendant's "proffer," that is, deciding not to prosecute, or, deciding to recommend a departure from the Guidelines under U.S.S.G. § 5k1.1. See, *Oyler v. Boles*, 368 U.S. 448, 456 (1961) (government is free to selectively prosecute); *Wade v. United States*, ___ U.S. ___; 112 S.Ct. 1840 (1992) (claim of prosecutorial bad faith insufficient to obtain review of government's refusal to file 5k1.1 motion).

Instead, operating under the guise of a "proffer agreement," the prosecutor may well exploit the defendant's false hopes by obtaining damaging impeachment evidence to be used in the defendant's case. Ultimately, all of these potential problems were expressly or implicitly considered by Congress. Thus, the better course, as decided by Congress, is to create a risk-free environment so that a defendant may openly and candidly reveal all that he or she knows about the crime(s) under investigation.

In the final analysis, the Justice Department's "widespread practice" must be seen for what it truly is. Pet. Cert., p. 10. Whether this action travels under the banner of a "waiver," "a proffer agreement" or another nomenclature, whether it is characterized as a minor adjustment or as some other positive change,[11] the fact remains that

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[11] See, Pet. Cert., pp. 10-14.

the Justice Department has impermissibly crossed the constitutional divide. See, *Public Citizen, supra*, 491 U.S. at pp. 486-487. And, it is no answer to say, as does the Justice Department in this case, that the government has acted in good faith and for the benefit of the greater public interest. See, Pet. Cert., p. 11, n. 1; see, *United States v. Koyomejian*, 970 F.2d 536, 545 (9th Cir. 1992) ("It is not enough that Congress and the President honestly believe they are complying with the Constitution; the federal courts must perform an independent review to make sure they are right."). Above all, the Constitution is committed to the proper tri-partite structure of our government, not to the perceived needs of any one branch. Such is the absolute and unchanging nature of our Constitution.

Measured against these constitutional standards, the Dissent's and the government's arguments necessarily come up short. For instance, Chief Judge Wallace points out that even though the government's waiver policy may deter a defendant from entering a plea-bargain, still nothing is lost because a defendant has no right to enter a plea-bargain in the first place. Pet. Cert., p. 7; Appendix, 14a-15a. True, a defendant has no right to plea-bargain, but there are constitutional reasons for this as well. Compelling the government to enter a plea-agreement, or even a plea-discussion for that matter,[12] would violate the Justice Department's exclusive prosecutorial powers. *United States v. Redondo-Lemos, supra*, 955 F.2d at p. 1299.

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[12] See, *Infra*, p. 11 (a plea-discussion and a plea-bargain agreement are not synonymous).

But just as the judiciary or the legislature may not require the government to enter a plea-bargain agreement, so too the government may not dictate the terms under which a plea-negotiation is to be conducted. Congress has the prerogative, indeed a prerogative shared only with the Supreme Court, to create the *type* of environment in which a plea-discussion is to take place. See, *United States v. Abel*, 469 U.S. 45, 49 (1984) ("Although we [the Court] are nominally the promulgators of the Rules, and should in theory need only to consult our collective memories to analyze the situation properly, we are in truth merely a conduit when we deal with an undertaking as substantial as the preparation of the Federal Rules of Evidence."); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9 (1940); 28 U.S.C. §§ 2072, 2073.[13] Congress has clearly defined the conditions of a plea-discussion through its enactment of the plea-statement rules. Thus, once the government decides to engage in a plea-discussion, it must do so according to the Congressional will. The government may not override The Rules to suit its own purposes, either on a case-by-case basis or as a blanket policy on all cases.[14]

Arguably, separation of powers is the unstated principle behind the holding of *United States v. Grant*, 622 F.2d

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[13] Thus, in one sense, the waiver policy violates the Supreme Court's exclusive rule-making authority.

[14] In passing, the Dissent observed that, in this case, the defendant, not the government, initiated the plea-negotiation. Appendix, 19a. But surely the dissent does not propose that the application of The Rules should turn upon this distinction. For, if they did, The Rules would effectively promote the very "cat-and-mouse" game Congress intended to abolish.

308 (8th Cir. 1980). The question in *Grant* was whether statements made by the defendant to FBI agents, who were authorized by the prosecuting attorney to conduct plea-negotiations, came within the protection of The Rules. On appeal, the government argued that they did not because the statements were actually made to the law enforcement officials without the presence of a government attorney as required by the literal language of the then-newly amended provisions. The Court of Appeals disagreed, reasoning that if the statements were not excluded "government attorneys *might attempt to avoid the operation of the rules* by authorizing law enforcement officials to conduct plea negotiations." *Id.* at p. 313, italics added.

While the facts of *Grant* are narrow and distinguishable from those of the present case, *Grant*, in principle and in language, argues for the broad proposition that the government may not create various schemes to circumvent the purpose and intent of The Rules. So too in this case, the Justice Department may not undermine The Rules by devising waivers of their protection.

If we bring this separation of powers analysis to the surface, and apply it to the text of The Rules, the same result follows. The Rules speak in mandatory terms: "[E]vidence of the following *is not* . . . admissible against the defendant who made the plea or was a participant in the plea discussions." Fed.R.Crim.P. 11(e)(6), italics added. If we go beyond The Rules themselves and look at Rule 11 as a whole, we see that Congress was specific in its use of mandatory and permissive language. Compare, Fed.R.Crim.P. 11 ("may" v. "shall" in all of its provisions). And, if we work with a broader canvas still, say – the

whole topography of statutory law – an essential truth about our jurisprudence reveals itself. Often, but not always, Congress tells us what provisions may and may not be waived through its use of mandatory and permissive language. See Generally, 3 Sutherland, Statutory Construction, (5th Ed. 1992), §§ 57.01-57.05, pp. 1-19; *Public Citizen v. Dept. of Justice, supra*, 491 U.S. at p. 469 (conc. opn., J. Kennedy) ("Reluctance to working with the basic meaning of words in a normal manner undermines the legal process."); Cf. *Fogerty v. Fantasy, Inc.*, ___ U.S. ___; 62 U.S.L.W. 4153, 4158 (1993) ("The word 'may' clearly connotes discretion."). A permissive statute contemplates or implies a waiver; a mandatory provision does not. See, *United States v. Olano*, ___ U.S. ___; 113 S.Ct. 1770, 1778 (1993) ("Rule 52(b) is permissive, not mandatory. If the forfeited error is 'plain' and 'affect[s] substantial rights,' the Court of Appeals has authority to order correction, but it is not required to do so. The language of the Rule ('may be noticed'), the nature of forfeiture, and the established appellate practice that Congress intended to continue, all point to this conclusion.")

This focus on legislation points up a basic fact; ours is a system of statutes. Through Congress, and ultimately only through Congress, procedural and substantive laws are enacted. Cf. *Texas Ind. Inc. v. Radcliff Materials*, 451 U.S. 630, 640-641 (1980); *Mistretta v. United States*, 488 U.S. 361, 368, n. 14 (1988) ("rulemaking power originates in the Legislative Branch and becomes an executive function only when delegated by the Legislature to the Executive Branch"); *Youngstown, supra*, 343 U.S. at p. 589 ("The Founders of this Nation entrusted lawmaking power to the Congress alone . . . "). To make this system work, the

laws – procedural or substantive – must be observed, not ignored. This "rule of law" holds true for the Justice Department as it does for any individual or entity. Cf. *Marbury v. Madison*, 5 U.S. 137, 163 (1803). And, by necessary implication, the laws cannot be circumvented by ingenious agreement of the parties, here through a concocted "waiver" agreement. e.g., *United States v. Goodapple, supra*, 958 F.2d at pp. 1408-1409 ("proffer agreements"); compare, *United States v. Olano*, ___ U.S. ___; 113 S.Ct. 1770, 1782 (1993) (con. opn, J. Kennedy) ("Indeed, there are good reasons to suppose that Federal Rule of Criminal Procedure 24(c) is the product of a judgment that our jury system should be given a stable and constant structure, one that cannot be *varied by a court with or without the consent of the parties.*", italics added).

Stated simply, litigants may never *properly* waive the mandatory language of any statute, assuming the terms are given mandatory effect.[15] It may well be that such a waiver amounts to harmless error, see, *United States v. Montalvo-Murillo, supra*, 495 U.S. at pp. 718-720, 722, but it is nonetheless error. Fed.R.Crim.P. 11(h) ("Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded."); compare, *United States v. Olano, supra*, 113 S.Ct. at p. 1777 (1993) ("Because the right to trial is waivable, and because the

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[15] The Majority Opinion below correctly observed that Congress intended the language of The Rules to have mandatory effect: "No one argues that Congress did not mean what it said." Appendix, 5a.

defendant who enters a valid guilty plea waives that right, his conviction without a trial is not 'error.' ").

Let us consider the two examples offered in the dissenting opinion. Chief Judge Wallace notes that statutory rights, such as the right to appeal a sentence, *United States v. Navarro-Botello*, 912 F.2d 318, 321 (9th Cir. 1990), and the right to bring civil rights actions, *Newton, supra*, 480 U.S. 386, are waivable. Appendix, 11a. But as to the first example, the Dissent fails to mention that the controlling statute is framed in permissive language.[16] With respect to a waiver of a civil rights action under 42 U.S.C. § 1983, Congress gave no directive or guidance. Thus, in successfully obtaining waivers in *Navarro-Botello* and in *Newton*, the government operated within the given statutory framework.

The same cannot be said here. The Justice Department's waiver policy collides head-on with Congress' clear mandatory directive.[17] Compare, *United States v.*

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[16] See, 18 U.S.C. § 3742(a) (sentences: "A defendant *may* file a notice of appeal . . . ") (italics added); Fed.R.App.P. 3(a) (convictions: "An appeal *permitted* by law as of right . . . ") (italics added).

[17] Indeed, the purpose and mandatory language of The Rules strongly suggest that the trial court lacks the power to give effect to any waiver of the plea-bargain provisions. Cf. *United States v. Kington*, 875 F.2d 1091, 1107-1108 (5th Cir. 1989) ("Both the legislative history of the Speedy Trial Act and the Advisory Committee's guidelines to administration of the Act appear to reflect a policy that might restrict the ability of trial courts to grant effective continuances in the guise of waivers").

While the amendment of Rule 11(h) overruled the per se rule of reversal under *McCarthy v. United States, supra*, 394 U.S. 459, nevertheless, Congress never intended Rule 11(h) to

Willis, supra, 958 F.2d at p. 63 (government may not seek waiver of Speedy Trial Act's mandatory terms). When private parties attempt to override the Congressional will through waivers, it becomes a question of statutory interpretation and public policy. *Infra*, pp. 5-6. When the Justice Department attempts to do the same, it becomes a question of statutory interpretation, public policy and separation of powers. Cf. *Youngstown, supra*, 343 U.S. at pp. 589-592.

This brings us to the last of the government's arguments. The Justice Department maintains, as does Chief Judge Wallace, that since all constitutional rights are waivable, *Edwards v. Arizona*, 451 U.S. 477, 489 (1980) (conc. opn. J. Powell), the plea-statement rules should be as well. Pet. Cert. p. 7; Appendix 10a-12a. But this conclusion rests upon a faulty analogy. Statutes do not always behave like constitutional provisions, nor is there any reason that they should. In a word, statutes are not mere "shadows"[18] of the Constitution; they have their own nature. But see, *United States v. Wiggins*, 905 F.2d 51, 53 (4th Cir. 1990); *United States v. Clark*, 865 F.2d 1433, 1437 (4th Cir. 1989); *United States v. Dortch, supra*, 5 F.3d at pp. 1068-1069.

The contrary assumption, in fact, has the dim residue of the Supremacy doctrine. To be sure, under the Supremacy Clause, a constitutional right takes precedence over a

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remove the trial court's mandatory obligations under Rule 11. See, 18 U.S.C.A. Rule 11, p. 363.

[18] See, W. T. Jones, 1 History of Western Philosophy, "The Classical Mind," pp. 124-146 (2d ed. 1970), on Plato's Republic.

statute, assuming the two conflict. Thus, under a Supremacy Clause analysis, statutes may do no more, and usually less, than constitutional provisions. See, *Marbury v. Madison, supra*, 5 U.S. at p. 176. But, supremacy is not in issue here. Rather, the question is whether a statute is, on its own terms, waivable. Hence, this case boils down to a matter of interpretation.

The Constitution has been interpreted to permit waivers of all constitutional rights, although the applicable standard for each may vary. See, *Schneckloth, et al. v. Bustamonte*, 412 U.S. 218, 235-246 (1972). As observed by the present Court of Appeals, reading a waiver into this and similar statutes is a more complicated matter:

> "To equate the waiver of these rules with that of an asserted constitutional protection is a false equality. Judicially created waivers of the latter are the result of an inescapable feature of courts interpreting the Constitution by defining the right being asserted. To write in a waiver in a waiverless rule promulgated by the Supreme Court and Congress, on the other hand, is not an inescapable duty. It more resembles unwelcome advice. *Given the precision with which these rules are generally phrased, the comparative recentness of their promulgation, and the relative ease with which they are amended, the courts can afford to be hesitant in adding an important feature to an otherwise well-functioning rule.*"

Appendix, 9a, italics added.

The Court of Appeals' studied comparison between The Rules and analogous constitutional rights frames a more basic distinction between statutory and constitutional jurisprudence. Because constitutional provisions

are not easily amended, like statutes, they are given a more flexible construction. Cf. *Marbury v. Madison, supra*, 5 U.S. at p. 176 ("The constitution is either a superior paramount law, unchangeable by ordinary means or it is on a level with ordinary legislative acts and, like other acts, is alterable when the legislature shall please to alter it."); *Webster v. Reproductive Health Serv.*, 492 U.S. 490, 518 (1989); see, 15 Univ.Ch.L.R. 501, 545 (1948) ("In the absence of some mechanism for achieving an authoritative determination, neither the literal meaning nor the intention of the framers [of the Constitution] can be decisive.").

III

THE GOVERNMENT'S WAIVER RULE LENDS ITSELF TO PROSECUTORIAL VOUCHING.

Vouching is a species of prosecutorial misconduct. Cf. *Berger v. United States*, 295 U.S. 78 (1934). It may occur at any time during trial, *United States v. McKoy*, 771 F.2d 1207, 1211 (9th Cir. 1985), and often assumes several different forms. Cf. *United States v. Young*, 470 U.S. 1, 18-19 (1984). But in all cases, the prosecution, in some way, has used the prestige of his Office to influence the jury's verdict. *Ibid.* It is this singular fact which makes vouching an absolutely prohibitive practice.

When a prosecutor takes the witness stand, the dangers of vouching are all too apparent. See, *United States v. Birdman*, 602 F.2d 547, 551-555 (3d Cir. 1979); *United States v. Prantil*, 764 F.2d 548, 552-554 (9th Cir. 1985). "The advocate-witness rule," as it is called, "prohibits an attorney from appearing as both a witness and an advocate in

the same litigation." *Prantil, supra,* at pp. 552-553. To allow otherwise would be to unfairly place the prestige of the United States Attorney's Office behind the testimony of a federal prosecutor. See, *United States v. Johnston,* 690 F.2d 638, 644 (7th Cir. 1982) (en banc). In a broad sense, then, this rule shares the same rationale found in the plea-statement rules – the promotion of fair procedures in the criminal justice system. *Ibid.*

Except in the most unusual cases, the advocate-witness rule bars an Assistant United States Attorney from testifying in the same case he is prosecuting. The rule, however, goes further by discouraging the testimony of prosecutors who were, in some way, involved in the investigation of the case. See, *United States v. West,* 680 F.2d 652, 654 (9th Cir. 1982) ("although testimony by a United States Attorney should not be encouraged, such persons are not disqualified as witnesses in cases in which they play no other role"); see, *United States v. McKoy,* 771 F.2d 1207, 1211 (9th Cir. 1985) (former prosecutor's testimony prohibited); *United States v. Marcello,* 731 F.2d 1354, 1358 (9th Cir. 1984).

Given the force of the rule, the United States Attorney's Office must do all that it can to avoid the rule's proscriptions. *United States v. Prantil, supra,* 764 F.2d at p. 553. The Justice Department's waiver policy does just the opposite. This is shown by the operation of The Rules itself. To come within their protections, the plea-statement rules require the presence of a government attorney. See, Fed.R.Crim.P. 11(e)(6)(D) ("any statement made in the course of plea discussions with *an attorney for the government* . . . ", italics added).[19] This means that, in every case involving The Rules, a prosecutor will be a percipient witness to, and most likely, a participant in, the plea-discussion. Thus, built into the government's waiver policy is an inherent vouching problem. In all trials following a plea-discussion, the testimony of an Assistant United States Attorney will be highly relevant.[20] See, *United States v. West, supra,* 680 F.2d at p. 654 ("although testimony by a United States Attorney should not be encouraged, such persons are not disqualified as witnesses in cases in which they play no other role").

In this case, for example, the prosecuting attorney was also a participant in the plea-discussion. As part of his trial strategy, the prosecutor used the fact of his involvement in the plea-discussion to great advantage. During cross-examination of the defendant, and during

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[19] This requirement of The Rules distinguishes plea-discussions from other interrogative encounters. For example, *Miranda* questioning typically involves police agents, not Assistant United States Attorneys. See, Notes of Conference Committee (1979 Amendment), reprinted in 18 U.S.C.A. Rule 11, p. 356 ("It thus protects the plea discussion process authorized by rule 11 without attempting to deal with confrontations between suspects and law enforcement agents, which involve problems of quite different dimensions.")

[20] The prohibition of the advocate-witness rule applies to proceedings before a judge and a jury. See, *United States v. Johnston, supra,* 690 F.2d at p. 644. Thus, a defendant may challenge the alleged voluntariness of his waiver of The Rules. If so, the district court will most likely be required to judge the credibility of the prosecutor's testimony against that of the defendant's and possibly defense counsel's testimony. See, *Jackson v. Denno,* 378 U.S. 368, 381-382, 391-392 (1963) (judge must reach issue of voluntariness of confession).

direct-examination of the investigating DEA agent, (one of two agents present during the plea-discussion), the prosecutor repeatedly asked questions requiring the witnesses to refer to his presence at the meeting, and what he said there. [RT 290-292, 294-295, 321-326, 365-367.] By controlling their testimony in this manner, the prosecutor effectively employed the witnesses as his mouthpiece. See, *United States v. McKoy, supra*, 771 F.2d at p. 1211 (vouching when prosecutor speaks to the jury as a witness). Through this subtle yet effective method, the prosecutor brought the prestige of the United States Attorney's Office to bear on the jury's verdict.

What is more, the government obstructed the defense from eliciting relevant testimony from the prosecutor. Specifically, the defense attempted to call the prosecutor to the stand, since he was a witness and participant to what was purportedly said and heard at the plea-discussion. But the district court barred the prosecutor's testimony. [RT 323-324].

The result was an absolute perversion of the advocate-witness rule. As explained by the Court of Appeals in *United States v. Prantil, supra*, 764 F.2d at p. 554, "The advocate-witness rule is aimed at protecting the integrity of the fact-finding process, not at distorting the process itself." On this, the court further noted, "Surely the reasoning behind the advocate-witness rule does not contemplate that a material witness will be able to exempt himself from the rigours of the fact-finding process by electing to proceed as an advocate." *Ibid*; *United States v. Johnston, supra*, 690 F.2d at p. 645 ("The apparent balance achieved by excluding both the defendant's testimony

about the telephone conversation and [the federal prosecutor's] anticipated impeaching response served only to immunize some of the relevant facts from being considered in the decisional process. . . . ").

All told, the prosecutor set the stage for vouching through the government's waiver rule, exploited it to full effect during examination and summation[21], and finessed the advocate-witness rule by not having to testify at trial. The result of this impressive strategy was, in the words of the district court, "one of the quickest jurys I have ever had . . . " RT 472. The government's waiver rule may be an important "weapon" in the "prosecutor's arsenal,"[22] but, at least in this case, it was no aid to the fair administration of criminal justice. Fed. R. Evid. 102.

CONCLUSION

Without question, the Justice Department must enjoy broad powers to ferret out and punish the criminals of our society. And doubtless, the government's waiver rule is a powerful "weapon" for prosecuting criminal defendants. But the Justice Department, like all of us, must operate within the framework of the law – within our system of statutes. Because if not, what kind of example would the Justice Department be setting, an example made by an agency of the Executive branch charged with

[21] See, RT 451-452 (prosecutor refers to his presence at plea-discussion meeting during closing argument).

[22] Pet. Cert., p. 13.

the responsibility "to take Care the Laws be faithfully executed."

For the foregoing reasons, the government's petition should be denied, or in the alternative, granted on all issues framed in this Opposition.

Respectfully submitted,

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